No. 18-431

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 903 F.3d 483. A prior opinion of the court of appeals (Pet. App. 10a-17a) is not published in the Federal Reporter but is reprinted at 677 Fed. Appx. 933.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2018. The petition for a writ of certiorari was filed on October 3, 2018. The petition for a writ of certiorari was granted on January 4, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924 (2012) provides in pertinent part:

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * * * *

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this brief. See App., *infra*, 1a-8a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, respondents Maurice Davis and Andre Glover were each convicted on one count of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); multiple counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and two counts of brandishing a short-barreled shotgun during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(i), 2, and 18 U.S.C. 924(c)(1)(C)(i) (2012). C.A. ROA (ROA) 269; Davis Am. Judgment 1. The district court sentenced Glover to 498 months of imprisonment, to be followed by two years of supervised release, and it sentenced Davis to 608 months of imprisonment, to be followed by two years of supervised release. ROA 270; Davis Am. Judgment 2. The court of appeals affirmed. Pet. App. 10a-17a. This Court granted respondents' petitions for writs of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). Pet. App. 1a-2a. On remand, the court of appeals vacated one Section 924(c) conviction as to each respondent and remanded the case to the district court. *Id.* at 1a-9a.

A. Respondents' Offense Conduct

1. Respondents conspired to commit a string of armed robberies of convenience stores in and around Dallas, Texas. See Gov't C.A. Br. 2-10 (summarizing trial evidence); Gov't Second Supp. C.A. Letter Br. 24

(same). Each robbery followed a similar pattern: two people—usually wearing red or green bandanas over their faces—would arrive at the targeted store in a gold SUV with no license plates; one would point a short-barreled shotgun at an employee and issue orders; and the robbers would take cigarettes and demand money. See *ibid.*

The first robbery occurred at about 3 a.m. on June 16, 2014, at a convenience store in Lancaster, Texas. ROA 645-654. One of the robbers grabbed the store's assistant manager, Andrea Douglas, from behind, put a short-barreled shotgun to her side, and asked if she had a "money bag." ROA 654; see ROA 644-645, 653. When Douglas explained that she could not open the store's safe, the robber ordered her to take him to a storage room and forced her to lie face down on the floor. ROA 654, 657. Douglas "was doing a lot of crying," and the robber told her that "he was going to hurt [her] if [she] didn't be quiet." ROA 657. The second robber then entered the storage room, and both robbers filled bags with cartons of cigarettes. ROA 656-657, 660. When they were done, one of the robbers told Douglas to wait 30 seconds before calling the police or he would kill her. ROA 662.

The second robbery occurred at about 2:30 a.m. on June 21, 2014, at a convenience store in Dallas. ROA 686-687, 690-691, 699. Two robbers drove up in the gold SUV and accosted Tomitha Hardge, a store employee who was standing outside. ROA 685-686, 690-691; Gov't C.A. Br. 4. One of the robbers pointed a short-barreled shotgun in Hardge's face; when she screamed, he ordered her to be quiet. ROA 691-692; Gov't C.A. Br. 4. The robber then forced Hardge to let him into the store's storage room, where he filled a gray plastic tub with

cartons of cigarettes. ROA 692-695. After loading the tub into the SUV, the robber instructed Hardge to open the store's safe. ROA 696. Hardge replied that she did not have access to the safe, at which point a passenger in the SUV—whom Hardge did not see but believed to be a woman—said, "Come on. Let's go." *Ibid.* The robber holding the shotgun then turned to Hardge and said, "Bitch, you better not snitch," before driving away. ROA 697.

The third robbery occurred on June 22, 2014. ROA 433. At about 7 a.m., a gold SUV pulled up to a convenience store in Mansfield, Texas. ROA 433-438; Gov't C.A. Br. 5. One of the robbers got out, pointed a short-barreled shotgun at an employee, Olivia Gaytan, and ordered her to go into the store's storage room. ROA 432-433, 438-439. A second robber followed Gaytan into the storage room and filled a gray plastic tub with cartons of cigarettes. ROA 439-442. One of the robbers then demanded that Gaytan open the safe. ROA 442. The robbers left after Gaytan informed them that the safe had a time lock and could not be opened for another hour. ROA 442, 444.

The fourth robbery occurred about 30 minutes later, when the same robbers did basically the same thing at another convenience store in Midlothian, Texas. ROA 462-463, 465, 722; Gov't C.A. Br. 6. One of the robbers entered the store and pointed a short-barreled shotgun at an employee, Kathy Oakley. ROA 462-463, 465, 469. Oakley begged the robber not to hurt her, and the robber said he would not do so if Oakley complied with his instructions. ROA 469. As the first robber held Oakley at gunpoint, the second robber entered the store with a gray plastic tub and filled it with cartons of cigarettes. ROA 470-471, 474. The robbers also stole a bank deposit

bag and money from an open safe. ROA 473-474; see ROA 465-466.

2. Shortly after the fourth robbery, law-enforcement agencies broadcast a lookout describing the robbers and their gold SUV. ROA 501-505. Officers spotted respondents, who matched the robbers' descriptions, in a gold SUV, and attempted to stop them at a McDonald's drive-through. ROA 504-507. When an officer, with his weapon drawn, ordered respondents to show their hands, respondents fled. ROA 507. A chase ensued, with speeds reaching 85 to 95 miles per hour in "[e]xtremely dangerous and wet" conditions. ROA 541; see ROA 509-510. After about two miles, respondents crashed the SUV into a concrete ditch and fled on foot, leaving behind a trail of cash. ROA 510-513.

Officers quickly caught Glover, ROA 516-518, and later discovered Davis hiding in bushes and sitting atop a pile of cash, ROA 518-519. Inside the SUV, officers found numerous cartons of cigarettes, a gray plastic tub, a loaded short-barreled shotgun, several shotgun shells, the bank deposit bag with cash from the fourth robbery, and articles of clothing that matched items worn by the robbers. ROA 571, 576-579, 585-590, 592-599. Davis later admitted his involvement in the third and fourth robberies but claimed that "[an]other person" had carried the gun. ROA 634; see ROA 630, 633-636. Glover declined to make any statements about the robberies. ROA 636.

B. Respondents' Criminal Prosecution

A federal grand jury indicted respondents on one count of conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); three counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and two counts of brandishing a short-barreled shotgun

during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(i), 2, and 18 U.S.C. 924(c)(1)(C)(i) (2012). ROA 13-18, 20-22. Glover was charged with an additional count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, and Davis was charged with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). ROA 19, 23.

Before trial, respondents moved to dismiss the Section 924(c) counts. See ROA 87-95. Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute contains its own specific definition of "crime of violence," which is applicable only "[f]or purposes of this subsection." 18 U.S.C. 924(c)(3). The definition covers any federal "offense that is a felony" and satisfies the criteria set forth in either 18 U.S.C. 924(c)(3)(A) or (B). 18 U.S.C. 924(c)(3). An offense satisfies Section 924(c)(3)(A) if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Section 924(c)(3)(B) alternatively includes any offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B).

Respondents contended that the underlying offenses identified in their Section 924(c) charges—their Hobbs Act robberies and their conspiracy to commit Hobbs Act robbery, ROA 17, 22—did not qualify as crimes of violence, see ROA 87-94. They took the view that those offenses did not satisfy Section 924(c)(3)(A) and that Section 924(c)(3)(B) was unconstitutionally vague in light of this Court's decision in *Johnson* v. *United States*,

135 S. Ct. 2551 (2015). See ROA 87-94. In *Johnson*, the Court had invalidated on vagueness grounds the residual clause in the sentence-enhancement provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which classifies a prior conviction as a "violent felony" if it was for a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." See 135 S. Ct. at 2555, 2560.

The district court denied respondents' motion, Pet. App. 19a, 22a, and the case proceeded to trial. The jury found Glover guilty on all counts and Davis guilty on all counts except one Hobbs Act robbery count. ROA 1368-1370. For the Section 924(c) charges, the jury made special findings that respondents brandished (or aided and abetted the brandishing of) a short-barreled shotgun during each crime of violence. *Ibid.*; see 18 U.S.C. 924(c)(1)(A)(ii) and (B)(i) (enhanced penalties for brandishing a firearm and possessing a short-barreled shotgun). The court sentenced Glover to concurrent terms of 78 months of imprisonment on the Hobbs Act counts, a consecutive term of 120 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 498 months of imprisonment. ROA 270. The court sentenced Davis to concurrent terms of 188 months of imprisonment on the Hobbs Act counts, a concurrent term of 180 months on the felon-in-possession count, a consecutive term of 120 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 608 months of imprisonment. Davis Am. Judgment 2.[1]

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[1] At the time of respondents' sentencing, Section 924(c) provided for enhanced minimum penalties for defendants convicted of multiple violations in a single proceeding. See 18 U.S.C. 924(c)(1)(C)(i)

C. Respondents' Initial Appeal And Petitions For Writs Of Certiorari

1. The court of appeals affirmed respondents' convictions and sentences. Pet. App. 10a-17a. The court rejected respondents' renewed constitutional challenge to Section 924(c)(3)(B). *Id.* at 12a-14a. The court relied on a recent en banc decision holding that the definition of a "crime of violence" in 18 U.S.C. 16(b), which is linguistically nearly identical to Section 924(c)(3)(B), was "not unconstitutionally vague in light of *Johnson*." Pet. App. 13a (citing *United States* v. *Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc), vacated, 138 S. Ct. 2668 (2018)).

The court of appeals also rejected Glover's alternative contention that "the jury should decide what constitutes a crime of violence." Pet. App. 14a n.4; see Glover C.A. Br. 18, 25-26. The court observed that circuit precedent treated the crime-of-violence determination as "a question of law reserved for the judge." Pet. App. 14a n.4 (citing *United States* v. *Credit*, 95 F.3d 362, 364 (5th Cir. 1996), cert. denied, 519 U.S. 1138 (1997)). The government's appellate brief, in addition to noting that Glover's proposed construction was foreclosed by circuit precedent, had also explained that any error in failing to seek a jury finding would have been harmless, because "the evidence was overwhelming" that respondents' crimes were "committed * * * in a way that involved the use

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(2012); *Deal* v. *United States*, 508 U.S. 129, 132-137 (1993). In the First Step Act of 2018, Pub. L. No. 115-391 (enacted Dec. 21, 2018; see S. 756, 115th Cong., 2d Sess. (2018)), Congress limited the applicability of the enhanced minimum penalties, in cases where a sentence "ha[d] not been imposed" before the Act's enactment, to violations of Section 924(c) that "occur[] after a prior conviction under [Section 924(c)] has become final." § 403(a)-(b).

or threatened use of force or posed a substantial risk that force would be used." Gov't C.A. Br. 28-29. The government observed, for example, that the trial evidence had established that Glover "thrice put a sawed-off shotgun to a woman—and his accomplice did so once—to demand her submission to his theft of cigarettes." *Id.* at 27.

2. Respondents petitioned for writs of certiorari, seeking review of whether the definition of a "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. See Pet. App. 1a. While respondents' petitions were pending, this Court decided *Sessions* v. *Dimaya*, *supra*, which held that the definition of a "crime of violence" in 18 U.S.C. 16(b), as incorporated into the removability provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, is unconstitutionally vague. See 138 S. Ct. at 1210, 1213.

Dimaya involved the application of Section 16(b) to classify an alien's prior state conviction as a "crime of violence" for purposes of removing him from the United States. See 138 S. Ct. at 1211-1212. Section 16(b), which is linguistically nearly identical to Section 924(c)(3)(B), defines a "crime of violence" to include "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16(b). But unlike Section 924(c)(3)(B)—and like the ACCA's residual clause at issue in *Johnson*—Section 16(b) applies in circumstances that include the classification of prior convictions (as in *Dimaya* itself). See *Dimaya*, 138 S. Ct. at 1212-1213 (plurality opinion).

The Court explained in *Dimaya* that Section 16(b), as incorporated into the INA, suffered from "the same

two features," "combined in the same constitutionally problematic way," that had led the Court to find the ACCA's residual clause unconstitutionally vague in *Johnson*. *Dimaya*, 138 S. Ct. at 1213. The first feature was a "categorical approach" to the crime-of-violence inquiry, under which a court would seek "to identify a crime's 'ordinary case'" and to assess whether the crime, in that idealized "ordinary case," poses a substantial risk that physical force will be used. *Id.* at 1211, 1215. The second feature was "uncertainty about the level of risk that makes a crime 'violent.'" *Id.* at 1215. The Court emphasized in *Dimaya*, as it had in *Johnson*, that it "'d[id] not doubt' the constitutionality of applying" a "'substantial risk'" standard like Section 16(b)'s "'to real-world conduct,'" rather than to "'a judge-imagined abstraction.'" *Id.* at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2558, 2561).

Although the Court's holding in *Dimaya* was premised on the applicability of the categorical approach, only a plurality of Justices concluded that Section 16(b) necessarily requires such an approach. See 138 S. Ct. at 1216-1218. The plurality recognized the Court's "'plain duty,' under the constitutional avoidance canon, to adopt any reasonable construction of a statute that escapes constitutional problems." *Id.* at 1216 (citations omitted). But it concluded that, in the context of Section 16(b), the canon did not counsel a circumstance-specific approach that would examine "the risk posed by a particular defendant's particular conduct," because such an approach "would merely ping-pong us from one constitutional issue to another." *Id.* at 1216-1217. The plurality explained that the categorical approach was itself designed in part to avoid Sixth Amendment concerns that would arise from judicial factfinding about the details of

prior convictions in certain sentencing contexts to which Section 16(b) applies. *Ibid.* The plurality also took the view that, "[i]n any event," Section 16(b)'s text is "[b]est read" to "demand[] a categorical approach." *Ibid.*

Justice Gorsuch, who concurred in part and concurred in the judgment, authored a separate opinion describing "some limits on today's holding." *Dimaya*, 138 S. Ct. at 1232. Justice Gorsuch explained that he had "proceeded on the premise" that the INA, "as it incorporates" Section 16(b), employs a categorical approach because "no party" had argued against that approach; precedent "seemingly require[d]" it; and the government had "repeatedly" acknowledged the propriety of such an approach. *Ibid.* Justice Gorsuch stated, however, that he "remain[ed] open to different arguments" about the Court's "precedent and the proper reading of language" like Section 16(b)'s in a future case. *Id.* at 1233.

In dissent, Justice Thomas, joined by Justices Kennedy and Alito, would have eschewed a categorical approach to Section 16(b) in favor of a focus on the underlying, real-world conduct of the alien's prior offense. *Dimaya*, 138 S. Ct. at 1254-1259. Justice Thomas explained that the underlying-conduct approach was both the "better" reading of Section 16(b), *id.* at 1255, and consistent with the constitutional-avoidance canon, *id.* at 1257; see *id.* at 1234-1241 (Roberts, C.J., dissenting) (not addressing whether Section 16(b) requires a categorical approach).

3. This Court subsequently granted respondents' petitions for writs of certiorari, vacated the judgment of the court of appeals in respondents' case, and remanded to the court of appeals for further consideration in light of *Dimaya*. See 138 S. Ct. 1979, 1979; 138 S. Ct. 1979, 1979-1980.

D. The Court Of Appeals' Decision On Remand

On remand, the government acknowledged that it had previously argued, consistent with circuit precedent, that Section 924(c)(3)(B) requires an ordinary-case categorical approach of the sort ascribed to Section 16(b) in *Dimaya*. Gov't Second Supp. C.A. Letter Br. 6. The government observed, however, that such an interpretation "raise[d] serious constitutional questions" in light of *Dimaya*, *ibid.*, and it accordingly urged the court of appeals to avoid those questions by construing Section 924(c)(3)(B) to instead require a circumstance-specific approach, *id.* at 6-7. Under that construction, "the classification of an offense as a 'crime of violence' under" Section 924(c)(3)(B) would "be based on the defendant's actual conduct" underlying the Section 924(c) prosecution. *Id.* at 6. The government pointed out that Section 924(c)(3)(B), unlike Section 16(b) or the ACCA's residual clause, is never applied to classify prior convictions and is instead confined only to the conduct for which a defendant is currently being prosecuted. *Id.* at 10-11. And the government explained that the failure to submit the substantial-risk inquiry to the jury was harmless because respondents' conduct—"which involved the planned and coordinated use of a sawed-off shotgun to immobilize and threaten employees"—"undoubtedly involved a substantial risk that force may be used during commission of the conspiracy" to commit Hobbs Act robbery. *Id.* at 23-24.

The court of appeals, however, declined to construe Section 924(c)(3)(B) in a manner that would avoid the constitutional difficulties identified in *Dimaya* and instead struck down Section 924(c)(3)(B) as impermissibly vague. Pet. App. 5a. The court adhered to circuit

precedent applying an ordinary-case categorical approach to Section 924(c)(3)(B) and concluded that the provision, so construed, is unconstitutional in light of *Dimaya*. *Id.* at 4a-5a. Because the court determined that the offense underlying one of the Section 924(c) counts of conviction for each respondent—conspiracy to commit Hobbs Act robbery—could qualify as a "crime of violence" only under Section 924(c)(3)(B), it vacated respondents' convictions on those counts and remanded to the district court with instructions to excise the sentences imposed as a result of those convictions. *Id.* at 4a, 6a. Judge Higginbotham concurred in the vacatur of the convictions, but wrote separately to object to the court's failure to remand for a full resentencing. *Id.* at 7a-9a.

SUMMARY OF ARGUMENT

The court of appeals erred in interpreting 18 U.S.C. 924(c)(3)(B) in a manner that rendered it unconstitutionally vague under *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). Section 924(c)(3)(B)'s subsection-specific definition of "crime of violence" applies only to the conduct for which the defendant is currently being prosecuted, not to any conduct for which the defendant may have been convicted in the past. The best construction of the provision in that context requires a circumstance-specific determination about whether that *actual* offense conduct—not the conduct of a hypothetical defendant in an "ordinary case"—satisfies the substantial-risk test in 18 U.S.C. 924(c)(3)(B). That construction, moreover, is confirmed by the canon of constitutional avoidance because the ordinary-case categorical approach would raise serious constitutional questions under this Court's decisions in *Dimaya* and *Johnson* v. *United States*, 135 S. Ct. 2551, 2561 (2015). And because no serious question exists that a properly instructed jury

would have found that respondents' armed-robbery conspiracy "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B), their vacated convictions should be reinstated.

I. This Court's decisions in *Dimaya* and *Johnson* "d[id] not doubt" that a provision requiring a jury finding beyond a reasonable doubt about the "substantial risk" created by a defendant's own "real-world conduct," would be fully constitutional. *Dimaya*, 138 S. Ct. at 1215 (quoting *Johnson*, 135 S. Ct. at 2561). As the government and several courts of appeals have recognized after *Dimaya*, Section 924(c)(3)(B) is best construed to require precisely that sort of commonplace circumstance-specific approach.

In a Section 924(c) prosecution, the jury already must determine (or the defendant must admit through a plea) that the defendant engaged in conduct that meets the elements of a discrete federal felony; that he did so while using, possessing, or carrying a firearm; and that the firearm had the requisite connection to the crime. In that context, the provision is best read to require the jury also to determine (or the defendant also to admit) that the defendant's conduct presented a "substantial risk" of physical force. 18 U.S.C. 924(c)(3)(B). That is exactly the type of fact-specific determination that juries are regularly called upon to make. A categorical approach that instead substitutes a judicial conjecture about the risk presented by the "judge-imagined abstraction" of "an idealized ordinary case of the crime," *Dimaya*, 138 S. Ct. at 1216 (citation omitted), would incongruously wrest authority *away* from the jury.

In the context of describing current conduct, rather than a prior conviction, the surrounding text of Section 924(c)(3)(B) further confirms a circumstance-specific approach, rather than a categorical one. Section 924(c)(3)(B) looks to the "course of committing the offense"—*i.e.*, the same conduct that the government already must prove to the jury in order to satisfy the other requirements of the statute. 18 U.S.C. 924(c)(3)(B). The provision uses the words "offense," "felony," and "involves," each of which this Court already has recognized to be consistent with a circumstance-specific inquiry. See *Nijhawan* v. *Holder*, 557 U.S. 29, 33-40 (2009). And the "nature" of the offense that the defendant has committed in a particular case is not an abstraction, but instead the conduct itself, stripped of any extraneous considerations such as the defendant's own subjective predilections toward or away from violence.

Notwithstanding the best contextual reading of the text and Congress's intentional decoupling of Section 924(c)(3)'s subsection-specific definition of a "crime of violence" from the more general one in 18 U.S.C. 16, courts and the government have in the past treated those definitions congruently for purposes of applying this Court's categorical-approach jurisprudence. But any assumption that Congress intended Section 924(c)(3)(B) to be interpreted the same way as the similarly worded provisions in Section 16(b) or the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii), cannot withstand this Court's identification of the ordinary-case categorical approach as a fatal defect in those other provisions. The categorical approach developed in large part due to concerns specific to the context of classifying *prior* convictions—an issue with Section 16(b) and the ACCA's residual

clause, but not with Section 924(c)(3)(B). Because Section 924(c)(3)(B) is limited to conduct already before a jury, a categorical approach is not necessary to avoid either the practical difficulties of attempting to determine the precise conduct underlying a long-ago conviction, nor the constitutional concerns that might arise from a sentencing court making factual determinations about such past conduct. Stripped of those concerns, therefore, the Court should adopt a reading of Section 924(c)(3)(B) that best comports with its text and purpose.

Indeed, were there any doubt on this score, it would be resolved by the longstanding rule that courts should adopt an available interpretation of a statute that avoids raising serious constitutional concerns. Whereas a circumstance-specific approach in the prior conviction context raised concerns about the denial of a defendant's jury-trial rights, a circumstance-specific approach to Section 924(c)(3)(B) actually *increases* the jury's role, while also avoiding the vagueness concerns this Court identified in *Johnson* and *Dimaya*. And it furthers the separation-of-powers rationale that animates the constitutional-avoidance canon, by respecting Congress's evident intent to punish offenders who employ firearms during and in relation to violent crimes. Interpreting Section 924(c)(3)(B) in a manner that renders it unconstitutional would forestall current and future prosecutions of clearly dangerous criminals under Section 924(c)(3) and allow already-incarcerated ones back on the streets.

II. Applying governing circuit precedent, the district court in this case concluded that respondents' conspiracy to commit Hobbs Act robbery categorically qualified as a crime of violence under Section 924(c)(3)(B). Although the court therefore did not instruct the jury

to determine whether the conduct involved in respondents' own conspiracy "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B), that error was harmless beyond a reasonable doubt. The course of respondents' conspiracy involved the planning and execution of a string of violent armed robberies in which respondents ambushed store clerks, held them at gunpoint, and threatened to injure them if they did not comply with respondents' demands for cigarettes and cash. Under the constitutionally valid circumstance-specific approach to Section 924(c)(3)(B), a jury would unquestionably have found that respondents' conduct satisfied the statute. At a minimum, a new trial before a properly instructed jury is warranted.

ARGUMENT

Respondents were validly convicted under 18 U.S.C. 924(c) (2012) for brandishing a sawed-off shotgun in furtherance of their conspiracy to rob a string of convenience stores. This Court has "not doubt[ed] the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1214 (2018) (quoting *Johnson* v. *United States*, 135 S. Ct. 2551, 2561 (2015)). Section 924(c)(3)(B)'s definition of "crime of violence" calls for just such an application of just such a standard. 18 U.S.C. 924(c)(3)(B). The jury that is making findings about a defendant's firearm-connected offense conduct can also make a finding about whether the conduct "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Ibid.* That circumstance-specific approach is

supported not only by the statutory language, as used in the limited context of describing the acts for which the defendant currently is being prosecuted, but also by courts' duty to avoid reading in the ordinary-case categorical approach that doomed the provisions at issue in *Johnson* and *Dimaya*. And it comports with Congress's evident intent to punish violent offenders like respondents, whose conspiracy to serially terrorize convenience-store clerks to obtain cigarettes and money was unquestionably a "crime of violence."

I. THE DEFINITION OF A "CRIME OF VIOLENCE" IN 18 U.S.C. 924(c)(3)(B) IS CONSTITUTIONALLY VALID

To convict a defendant of violating Section 924(c), the jury must determine (or the defendant must admit in a plea) that he carried, used, or possessed a firearm; that he "committed all the acts necessary to be subject to punishment for" a separately proscribed "crime of violence"; and that the carrying, use, or possession of the firearm was sufficiently connected to those acts. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). In making those determinations, the jury is well-positioned also to determine whether those acts constituted a "crime of violence" under Section 924(c)(3)(B). Although courts and the government generally have not historically interpreted Section 924(c)(3)(B) to call for such a circumstance-specific inquiry, this Court's decision in *Dimaya*—which makes clear that the prior approach would render the provision unconstitutional—has invited a closer examination of the issue. As several courts of appeals have recognized, the language of Section 924(c)(3)(B), in the context of a criminal statute that contemplates a jury's consideration of the relevant offense conduct, readily embraces a circumstance-specific

approach. And the canon of constitutional avoidance confirms the propriety of that approach.

A. Section 924(c)(3)(B) Is Best Read To Require A Circumstance-Specific Inquiry By The Jury That Is Deciding Whether A Defendant's Conduct Violated Section 924(c)

Congress has frequently enacted provisions that require a "'circumstance-specific'" determination, based on "the facts and circumstances," of whether "the specific way" in which a crime was committed "on a specific occasion" meets a statutory definition. *Nijhawan* v. *Holder*, 557 U.S. 29, 34 (2009) (construing provision in that manner); see, *e.g.*, *id.* at 38-39 (providing other examples); *United States* v. *Hayes*, 555 U.S. 415, 426 (2009) (construing statute in same way). Section 924(c)(3)(B) fits comfortably within that mold.

1. In the context of a jury trial on a Section 924(c) charge, Section 924(c)(3)(B)'s "substantial risk" requirement suggests a jury question

A prosecution under Section 924(c) necessarily focuses on what the defendant actually did. The jury must find conduct that meets the elements of a separate federal felony—*e.g.*, kidnapping—whether or not the defendant also is prosecuted for that underlying crime. See *Rodriguez-Moreno*, 526 U.S. at 280. And the jury must inquire into the specifics of the defendant's acts in order to make the further finding that the defendant "use[d] or carrie[d]" a firearm "during and in relation to," or "possess[ed]" a firearm "in furtherance of," his otherwise-unlawful conduct. 18 U.S.C. 924(c)(1)(A). All of those findings depend "exclusively" on the evidence

before the jury about the circumstances of the defendant's own case. *Ovalles* v. *United States*, 905 F.3d 1231, 1248 (11th Cir. 2018) (en banc).

When those findings are made, the only remaining requirement for conviction under Section 924(c) is that the crime connected to the firearm be a "drug trafficking crime" or a "crime of violence." 18 U.S.C. 924(c)(1)(A). For an alleged "drug trafficking crime," no further jury finding is required. Because a "drug trafficking crime" is defined to include "any felony punishable" under certain federal laws, see 18 U.S.C. 924(c)(2), the jury's finding of guilt following instruction on the elements of, say, methamphetamine manufacturing, in violation of 21 U.S.C. 841(a), will automatically show that the defendant committed such a crime. The same is true for the first definition of "crime of violence" in 18 U.S.C. 924(c)(3)(A), which includes any "offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Where a defendant is charged with, say, using a firearm during and in relation to a robbery, and the jury instructions therefore include the elements of robbery under the Hobbs Act, in violation of 18 U.S.C. 1951(a), a guilty verdict necessarily reflects its finding of a force-related element, without any further inquiry into the specifics. See *Stokeling* v. *United States*, 139 S. Ct. 544, 555 (2019) (finding common-law robbery categorically satisfies identically worded clause of the ACCA).

The alternative definition of "crime of violence" in Section 924(c)(3)(B), however, does not turn on where in the federal code the conduct is proscribed (as with "drug trafficking crime") or what "element[s]" that proscription "has" (as with Section 924(c)(3)(A)'s "crime of

violence" definition). Instead, it includes any felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). Its position within the statutory structure dictates that it must include conduct that is not otherwise covered by Section 924(c)(3)(A). Cf. *DePierre* v. *United States*, 564 U.S. 70, 83 (2011) (describing principle that different provisions of a statute are presumed to have different meanings). But following this Court's decision in *Dimaya*, courts have diverged about how to determine whether a defendant's conduct is a "crime of violence" under Section 924(c)(3)(B).

The court below adhered to circuit precedent interpreting the definition to require a form of "categorical" approach, under which a judge, without regard to the jury's findings about a defendant's own conduct, imagines the "ordinary" conduct that would meet the elements on which the jury was instructed. See Pet. App. 4a-5a. The judge then makes an assessment about whether that hypothetical ordinary case carries the sort of substantial risk that Section 924(c)(3)(B) requires. *Id.* at 5a. Under that approach, a particular Section 924(c) defendant's own conduct is irrelevant. If, for example, a judge concludes that the "ordinary" case of transporting a minor for illegal sexual activity, in violation of 18 U.S.C. 2423(a), is nonviolent, then it does not matter whether a particular defendant beat and threatened a minor in order to coerce her acquiescence. Notwithstanding that the ordinary-case categorical approach completely disregards the defendant's own conduct, and the jury's otherwise exclusive role in determining it, the courts and the government have—with some difficulty—applied that approach for many years.

As several courts of appeals and the government have now recognized, however, that approach not only renders the statute unconstitutionally vague in light of *Dimaya*, see pp. 44-48, *infra*, but is incongruous with the conduct-based focus of Section 924(c) and the traditional domain of a jury at a criminal trial. See *United States* v. *Douglas*, 907 F.3d 1, 13-17 (1st Cir. 2018), petition for cert. pending, No. 18-7331 (filed Jan. 7, 2019); *Ovalles*, 905 F.3d at 1248-1250; *United States* v. *Barrett*, 903 F.3d 166, 181-184 (2d Cir.), petition for cert. pending, No. 18-6985 (filed Dec. 3, 2018). The substantial-risk determination is one that a jury is well-positioned to make (or find not to be supported) on the facts before it. And the customary way to apply a "qualitative standard such as 'substantial risk'" is to do so by reference "to real-world conduct," not to a hypothetical, judicially imagined "ordinary case" of the crime. *Johnson*, 135 S. Ct. at 2561. As this Court has recognized, "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" and "almost all" of them "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Ibid.*

For example, a typical reckless-endangerment or criminal-recklessness offense is defined as "recklessly engag[ing] in conduct which creates a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20 (McKinney 2009); see, *e.g.*, Ala. Code § 13A-6-24(a) (LexisNexis 2015); Alaska Stat. § 11.41.250(a) (2016); Ariz. Rev. Stat. Ann. § 13-1201(A) (2010); Ark. Code Ann. § 5-13-205(a)(1) (2013); N.D. Cent. Code § 12.1-17-03 (2012). Many other offenses in disparate areas of the criminal law—including arson, theft, sexual assault, threats, resisting arrest, vehicular

homicide, and kidnapping—use comparable risk-based formulations to define the crime or aggravating elements. See, *e.g.*, 21 U.S.C. 858; Conn. Gen. Stat. Ann. § 53a-111(a)(4) (West 2012); Ind. Code Ann. § 35-43-4-2(a)(2) (LexisNexis Supp. 2018); Iowa Code Ann. § 709.3(1)(a) (West 2016); Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2018); Mass. Ann. Laws ch. 265, § 13L (LexisNexis 2010); Utah Code Ann. § 76-5-301(1)(b) (LexisNexis 2017); see also *Ovalles*, 905 F.3d at 1250 n.8 (providing additional examples); Gov't Supp. Br. App. at 1a-99a, *Johnson*, *supra* (No. 13-7120) (same).

Section 924(c)(3)(B) is best construed to similarly contemplate a finding by the same jury that is otherwise determining whether the defendant's conduct violated the statute. Where the jury instructions do not already require the jury to find the sort of "element" described in Section 924(c)(3)(A), the judge would instruct the jury that it must make the "crime of violence" finding for itself by determining, based on the facts of the offense that the jury already is required to find, whether the defendant's conduct by its nature involved a substantial risk that physical force may have been used against the person or property of another in the course of committing that offense. See *Ovalles*, 905 F.3d at 1252. "There is nothing remarkable about asking jurors to make that sort of risk determination—and, if necessary, requiring judges to instruct jurors on the meaning of terms like 'substantial' and 'physical force' "; indeed, that is "exactly how similar questions have been resolved for centuries and are resolved every day in courts throughout the country." *Id.* at 1250 n.8; see *Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2561.

Since *Dimaya*, several courts of appeals have adopted, at the government's urging, a circumstance-specific approach to Section 924(c)(3)(B). See *Douglas*, 907 F.3d at 4; *Ovalles*, 905 F.3d at 1234; *Barrett*, 903 F.3d at 169. Within those circuits, district courts have instructed juries to determine, on the facts before them, whether a charged underlying offense qualifies as a "crime of violence" under Section 924(c)(3)(B). See, *e.g.*, 7/16/18 Tr. at 594-595, *United States* v. *Blanco*, No. 16-cr-408 (S.D.N.Y.); 8/20/18 Tr. at 1870-1871, *United States* v. *Cook*, No. 17-cr-65 (D. Conn.); 11/5/18 Tr. at 947-948, *United States* v. *Ullah*, No. 18-cr-16 (S.D.N.Y.); see also Jury Instructions at 56, *United States* v. *Fisher*, No. 15-cr-20652 (E.D. Mich. Aug. 22, 2018). Those juries have been able to follow those instructions and reach verdict in those cases.

2. The surrounding text of Section 924(c)(3)(B) supports submitting the substantial-risk question to the jury

As this Court has repeatedly explained, statutory language "cannot be construed in a vacuum." *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). Rather, "a fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Ibid.* (citation omitted). Congress enacted Section 924(c)(3)(B)'s "crime of violence" definition "[f]or purposes of this subsection"—*i.e.*, exclusively for Section 924(c). 18 U.S.C. 924(c)(3). In that context, where the government *already* must prove to the jury the conduct that constitutes the "crime of violence," the statutory text is best read to require the jury *also* to determine whether the conduct "by its nature, involves a substantial risk that physical force

against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). That interpretation accords not only with the jury-suggestive "substantial risk" language, but also with the surrounding text.

a. Section 924(c)(3)(B) focuses its inquiry on "the course of committing the offense." 18 U.S.C. 924(c)(3)(B). The conduct that constitutes "the course of committing the offense" is part of what the jury must find in determining a defendant's guilt or innocence. That language naturally suggests that the same jury should determine the "risk[iness]" of the defendant's actual conduct, *ibid.* —not that the judge should conduct the substantial-risk inquiry based on a "judge-imagined abstraction" of "an idealized ordinary case of the crime," *Dimaya*, 138 S. Ct. at 1216 (citation omitted).

In this context, the "offense" whose "course of commi[ssion]" is at issue is properly understood as the defendant's *own* violation of a legal prohibition, rather than just the legal prohibition in the abstract. As this Court recognized in *Nijhawan* v. *Holder*, *supra*, "in ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime, say, the crime of fraud or theft in general, and sometimes refer to the specific acts in which an offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed last month." 557 U.S. at 33-34. The Court in *Nijhawan* accordingly interpreted a provision using the term "offense," 8 U.S.C. 1101(a)(43)(M), to "call[] for a 'circumstance-specific,' not a 'categorical,' interpretation"—even though neighboring uses of the word "offense" required the opposite. 557 U.S. at 36; see *id.* at 37-38. Similarly, in *United States* v. *Hayes*, *supra*,

the Court interpreted the phrase "an offense * * * committed by a current or former spouse," 555 U.S. at 420 (quoting 18 U.S.C. 921(a)(33)(A)), to contemplate a factual, rather than a categorical, inquiry, see *id.* at 426-429.

The circumstance-specific meaning of "offense" is consistent with the only other use of the term in Section 924(c)(3). Section 924(c)(3) defines a "crime of violence" as an "offense that is a felony" that satisfies either the elements clause of Section 924(c)(3)(A) or the substantial-risk inquiry of Section 924(c)(3)(B). 18 U.S.C. 924(c)(3). The term "felony," like the term "offense," can have a circumstance-specific meaning. See *Nijhawan*, 557 U.S. at 33-34. And because the circumstance-specific meaning of the term "offense" encompasses *both* the defendant's acts *and* the law those acts violated, Section 924(c)(3) is best interpreted to classify an "offense" as a "crime of violence" when it either has particular conduct "as an element" *or* is "committ[ed]" in a particular way. 18 U.S.C. 924(c)(3)(A) and (B). This Court construed the term "offense" that way in *Hayes*, which involved a definition requiring that an "offense" simultaneously be "'a misdemeanor'"; have a particular type of "'element'"; and also circumstance-specifically be "'committed'" by a person with a particular relationship to the victim. 555 U.S. at 421 (quoting 18 U.S.C. 921(a)(33)(A)).

b. Section 924(c)(3)(B)'s requirement of an inquiry into whether the commission of the offense "involves" the substantial risk of physical force also supports a circumstance-specific approach. 18 U.S.C. 924(c)(3)(B). Congress has employed the term "involves" in many provisions of the criminal code—including in other provisions enacted as part of the statute that added the "crime of violence" language to Section 924(c)—in a

manner "that require[s] looking into a defendant's underlying conduct rather than a hypothetical or idealized offense." *Douglas*, 907 F.3d at 12 (citing provisions of the Comprehensive Crime Control Act of 1984 (Comprehensive Crime Control Act), Pub. L. No. 98-473, Tit. II, 98 Stat. 1976)). Another provision of Section 924(c), for example, provides an enhanced penalty for subsequent convictions under that statute "if the firearm *involved* is a machinegun or a destructive device." 18 U.S.C. 924(c)(1)(C)(ii) (2012) (emphasis added). Other statutes contain similar language in the definition of either basic elements or sentence-enhancing facts that a jury must find about a defendant's conduct in the context of a criminal prosecution.[2]

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[2] See, *e.g.*, 18 U.S.C. 43(a)(1) and (2)(B) (prohibiting interference with an "animal enterprise" "by a course of conduct *involving* threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation") (emphasis added); 18 U.S.C. 111(a) (providing enhanced penalty for assault on federal officer that "*involve[s]* physical contact with the victim of that assault or the intent to commit another felony") (emphasis added); 18 U.S.C. 351(e) (same for assault of Members of Congress, cabinet officials, and Supreme Court Justices "if the assault *involved* the use of a dangerous weapon") (emphasis added); 18 U.S.C. 666(b) (prohibiting theft or bribery in connection with "Federal program[s] *involving* a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance") (emphasis added); 18 U.S.C. 670(b)(2)(A) (providing enhanced penalty for theft of medical products that "*involves* the use of violence, force, or a threat of violence or force") (emphasis added); 18 U.S.C. 1028(b)(1)(D) (providing enhanced penalty for identity fraud "that *involves* the transfer, possession, or use" of identification to obtain $1000 or more in value) (emphasis added); 18 U.S.C. 1035(a) (prohibiting false statements "in any matter *involving* a health care benefit program") (emphasis added); 18 U.S.C. 1341, 1343 (same for mail and wire fraud "*involving* any benefit" provided in connection with national disasters or emergencies) (emphasis added); 18 U.S.C. 2118(a) and (e)(3) (prohibiting robberies of

Even where provisions classify *prior* convictions—whose underlying facts are *not* already before a later tribunal—the word "involves" can be consistent with a circumstance-specific approach. In *Taylor* v. *United States*, 495 U.S. 575 (1990), the Court pointed to the word's *absence* as one reason to adopt a categorical, rather than circumstance-specific, approach to determining whether a defendant had a sentencing-enhancing prior conviction for "burglary" under the ACCA. *Id.* at 600. The Court also has recognized that the presence of the word "involves" complicated its adoption of a categorical approach to the ACCA's residual clause. See *Nijhawan*, 557 U.S. at 36. And it has interpreted an INA provision concerning the classification of a prior conviction that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" to require a categorical approach with respect to the fraud-or-deceit inquiry and a circumstance-specific approach with respect to the amount of loss. 8 U.S.C. 1101(a)(43)(M)(i); see *Kawashima* v. *Holder*, 565 U.S. 478, 483-485 (2012); *Nijhawan*, 557 U.S. at 40. A circumstance-specific interpretation of "involves" is also consistent with other

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controlled substances that result in "significant bodily injury," defined as "bodily injury which *involves* a risk of death, significant physical pain," or other specified injuries) (emphasis added); 18 U.S.C. 2252(a)(1)(A) (prohibiting transmission of "any visual depiction" that "*involves* the use of a minor engaged in sexually explicit conduct") (emphasis added); 18 U.S.C. 3592(c)(6) (authorizing sentence of death for homicide offense upon jury finding that "[t]he defendant committed the offense in an especially heinous, cruel, or depraved manner in that it *involved* torture or serious physical abuse to the victim") (emphasis added).

criminal statutes that use the word in a circumstance-specific manner in the context of a prior offense.[3]

c. In the context of conduct currently before the jury, the modifier "by its nature" further supports a circumstance-specific approach. "[T]he word 'nature' as used in the phrase 'by its nature' is commonly understood to mean 'the basic or inherent features, character, or qualities of something.'" *Barrett*, 903 F.3d at 182 (quoting *Oxford Dictionary of English* 1183 (3d ed. 2010)); see, *e.g.*, *Webster's Third New International Dictionary* 1507 (2002) (variously defining "nature" as the "normal and characteristic quality," "essential character," and "distinguishing qualities or properties of something"). In the context of Section 924(c)(3)(B), that "something" is the defendant's particular conduct in violation of federal law. *Ovalles*, 905 F.3d at 1247; see *Douglas*, 907 F.3d at 11; *Barrett*, 903 F.3d at 182. "It is entirely natural to use words like 'nature' and 'offense' to refer to an offender's actual underlying conduct." *Dimaya*, 138 S. Ct. at 1254 (Thomas, J., dissenting); see *id.* at 1254 n.7 (listing examples); *Schware* v. *Board of Bar Exam'rs*, 353 U.S. 232, 242-243 (1957) (describing

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[3] See, *e.g.*, 18 U.S.C. 3592(c)(2) (authorizing sentence of death for homicide offense upon jury finding that defendant had "previously been convicted of a Federal or State offense * * * involving the use or attempted or threatened use of a firearm"); 18 U.S.C. 3592(c)(4) (same where defendant had "previously been convicted of 2 or more Federal or State offenses * * * involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person"); see also *United States* v. *Rodriguez*, 581 F.3d 775, 805-807 (8th Cir. 2009) (rejecting argument that categorical approach should apply to Section 3592(c)(4)), cert. denied, 562 U.S. 981 (2010); *United States* v. *Higgs*, 353 F.3d 281, 316-317 (4th Cir. 2003) (same for Section 3592(c)(2)), cert. denied, 543 U.S. 999 (2004).

"the nature of the offense" at issue as "recruiting persons to go overseas to aid the Loyalists in the Spanish Civil War"); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 482 (1993) (O'Connor, J., dissenting) (describing "the nature of the offense at issue" as not "involving grave physical injury" but rather as a "business dispute between two companies in the oil and gas industry").

Two violations of the same criminal statute can have very different natures, such that one "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B), and the other does not. A conspiracy to commit arson of a rival gang's headquarters, for example, is "by its nature" different from a conspiracy to commit arson of one's own property for insurance money. See 18 U.S.C. 844(i) (defining arson to include arson of a defendant's own property). And the focus on the "nature" of the crime has the practical effect of limiting the jury's inquiry to the *offense*, rather than the *offender*, or any other extraneous considerations. The phrase "by its nature" assures, for example, that the jury may not consider evidence of the defendant's prior violent crimes or acts in determining whether a "substantial risk" existed that the defendant might have used force during the instant offense, even if that evidence is admissible for other purposes. See, *e.g.*, *Dowling* v. *United States*, 493 U.S. 342, 344-345 (1990) (discussing use of evidence of prior violent crime for identification purposes). Conversely, a defendant could not seek to establish the lack of a substantial risk by introducing evidence of his peaceful nature or of the non-violent circumstances of his past offenses.

In the context of a *prior conviction*, in contrast, attaching the modifier "by its nature" to the inquiry into whether an offense "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B), might suggest a categorical approach. This Court's decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), for example, focused on that modifier as an indication that the definition of "crime of violence" in 18 U.S.C. 16(b)—which is linguistically almost identical to Section 924(c)(3)(B)[4]—requires a categorical approach in the context of an immigration proceeding that required Section 16(b)'s application to a prior conviction. 543 U.S. at 7; see also *Dimaya*, 138 S. Ct. at 1217 (plurality opinion) (similar). But the "nature" of a prior conviction and the "nature" of the offense underlying a Section 924(c) prosecution are two different things. See, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion) (noting that "the same words, placed in different contexts, sometimes mean different things"). Whereas the "nature" of a prior conviction may be the legal determination reflected in the judicial records of that conviction, cf. *Shepard* v. *United States*, 544 U.S. 13, 16 (2005), the "nature" of a current offense is the defendant's particular conduct. The use of the phrase "by its nature" in the jury-trial context of Section 924(c) proceedings thus does not suggest that Congress intended for a judge to resolve the substantial-risk inquiry as an abstract question of law.

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[4] Section 16(b) sets off the phrase "by its nature" in a separate appositive clause; Section 924(c)(3)(B) does not include a comma before the word "by."

B. Congress's Restriction Of Section 924(c)(3)(B) To The Jury-Trial Context Removes The Practical And Constitutional Concerns That Support The Categorical Approach In The Context Of Classifying Prior Convictions

Section 924(c)(3)(B)'s limitation to the classification of an offense already before the jury not only provides critical context for interpreting its language, but also eliminates the practical and constitutional concerns that animated this Court's adoption of the categorical approach for other statutes. The Court has only considered, and only embraced, the categorical approach in the "singular context" of "*judicial* identification of what crimes (most often, state crimes) of *prior* conviction fit federal definitions of violent crimes so as to expose a defendant to enhanced penalties or other adverse consequences in *subsequent* federal proceedings." *Barrett*, 903 F.3d at 181. Although the lower courts and the government previously interpreted Section 924(c)(3)(B) in line with the Court's decisions in the prior-conviction context, the decisions themselves make clear that they rest in large part on practical and constitutional considerations that do not apply in Section 924(c)(3)(B)'s jury-trial context. *Douglas*, 907 F.3d at 13 (observing that the Court "fashioned and refined the categorical approach both for practical and constitutional reasons that are specific to the consideration of a prior conviction"). Those decisions therefore cannot support continued disregard for the best contextual interpretation of Section 924(c)(3)(B). See *Dimaya*, 138 S. Ct. at 1256 (Thomas, J., dissenting) ("[T]he categorical approach was never really about the best reading of the text.").

1. Decisions adopting the categorical approach in the prior-conviction context have anachronistically influenced the interpretation of Section 924(c)(3)(B)

Congress intentionally separated Section 924(c)(3)(B)'s subsection-specific definition of "crime of violence" from other provisions that employ similar language but—unlike Section 924(c)(3)(B)—apply in the context of prior convictions. Before this Court's decision in *Dimaya*, however, lower courts and the government relied on this Court's decisions interpreting those other provisions to adopt a categorical approach to Section 924(c)(3)(B).

a. When Congress enacted Section 924(c)(3)(B)'s subsection-specific "crime of violence" definition in the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 457, in 1986, this Court had never addressed, let alone endorsed, a categorical approach to the classification of offenses at all. Congress thus would not have anticipated a categorical approach to the classification of a defendant's conduct that is already before the jury, and nothing suggests that it affirmatively wanted to take the substantial-risk inquiry out of the jury's hands. Indeed, it deliberately isolated Section 924(c)(3)(B) from other code provisions that have since been construed to incorporate a categorical approach.

As originally enacted, Section 924(c) made it a crime for an individual to "use[] a firearm to commit *any felony* which may be prosecuted in a court of the United States," or to "carr[y] a firearm unlawfully during the commission" of such a felony. Gun Control Act of 1968, Pub. L. No. 90-618, Tit. I, § 102, 82 Stat. 1224 (emphasis added). In the ensuing years, Congress considered several proposals to "refine the offense by confining it to

its proper and practical boundaries as a means of deterring and punishing the employment of a firearm" during violent crimes. S. Rep. No. 307, 97th Cong., 1st Sess. 889 (1981). In 1981, for example, the Senate Judiciary Committee reported on proposed revisions to Section 924(c) that would have limited the underlying offenses to certain "crime[s] of violence" in a manner similar to the current version except that it also would have included "certain misdemeanors." *Id.* at 888; see *id.* at 888-889 & n.42. The Committee described the scope of misdemeanor coverage in conduct-focused terms, explaining that the proposal would not cover "a 'misdemeanor that consists solely of damage to property and that does not place another person in danger of death or serious bodily injury'"—a limitation that was "intended to exclude situations in which a person, at no risk to human safety, uses a firearm to damage a sign or other object on a Federal reservation or to shoot game unlawfully." *Id.* at 889. And it emphasized that Section 924(c) overall would remain focused on "dangerous criminal *conduct*." *Id.* at 888 (emphasis added).

In 1984, Congress revised Section 924(c) to prohibit "us[ing] or carr[ying] a firearm" "during and in relation to" a federal "crime of violence." Comprehensive Crime Control Act, Ch. X, Pt. D, § 1005(a), 98 Stat. 2138. The 1984 revision to Section 924(c) did not contain its own definition of "crime of violence," but instead incorporated the general definition of that term set forth in 18 U.S.C. 16, which was enacted as part of the same legislation (and which remains unchanged today). See S. Rep. No. 225, 98th Cong., 1st Sess. 307, 313 n.9 (1983) (1983 Senate Report); see also Comprehensive Crime Control Act, Pt. A, § 1001(a), 98 Stat. 2136. The Senate Judiciary Committee explained that the "essence" of

the "crime of violence" definition, as applied to Section 924(c), was that it limited the statute's application to "offenses in which the use of physical force is an element," as well as to "*any felony which carries* a substantial risk of such force," 1983 Senate Report 313 n.9 (emphasis added)—not one that ordinarily (or necessarily) requires such a risk in the abstract.

At the time that amendment was enacted, and for several years thereafter, the "substantial risk" inquiry required under 18 U.S.C. 16(b) was not uniformly understood to require a categorical approach. The government, for example, argued in several Section 924(c) cases that Section 16(b) required a circumstance-specific approach to determining whether drug trafficking offenses qualified as "crime[s] of violence" for purposes of Section 924(c). See, *e.g.*, *United States* v. *Cruz*, 805 F.2d 1464, 1469 (11th Cir. 1986) (noting that the government "asks us to inquire whether the crime, as committed, actually created a substantial risk of harm."), cert. denied, 481 U.S. 1006, and 482 U.S. 930 (1987); *United States* v. *Bushey*, 617 F. Supp. 292, 299 (D. Vt. 1985) (describing government's argument that court should consider whether crime, as committed with a firearm, constitutes a crime of violence). And the Sentencing Commission interpreted Section 16 to cover not only certain categories of offenses (*e.g.*, "murder," "aggravated assault," "robbery") that would invariably meet its requirements, but also "[o]ther offenses * * * if the conduct for which the defendant *was specifically convicted* meets the [statutory] definition." Sentencing Guidelines § 4B1.2, comment. (n.1) (1987) (emphasis added).

After courts began to settle instead on a categorical approach that excluded drug trafficking (which can be committed through nonviolent consensual sales), see,

e.g., *United States* v. *Diaz*, 778 F.2d 86, 88 (2d Cir. 1985) (per curiam), Congress *amended* Section 924(c) to abrogate those decisions. The Firearms Owners' Protection Act both defined "drug trafficking crime[s]" as underlying offenses under Section 924(c) *and* decoupled Section 924(c)'s definition of a "crime of violence" from Section 16 by enacting a new definition of that term in Section 924(c)(3) that applied only "[f]or purposes of this subsection." § 104(a)(2)(B), (C), and (F), 100 Stat. 457; see, *e.g.*, H.R. Rep. No. 495, 99th Cong., 2d Sess. 2 (1986). The decision to give Section 924(c)(3) its own, freestanding crime-of-violence definition contrasted with congressional action regarding other provisions. Congress simultaneously amended 18 U.S.C. 929, which prohibits the possession of armor-piercing ammunition in connection with certain crimes, to include drug-trafficking crimes; but it did *not* disturb Section 929's incorporation of Section 16's definition of "crime of violence." See Firearms Owners' Protection Act § 108, 100 Stat. 460. The addition of a self-contained, subsection-specific "crime of violence" definition in Section 924(c) thus demonstrates Congress's intention for Section 924(c)(3)(B) to stand apart from the more broadly applicable definition in Section 16(b).

b. Any development of a circumstance-specific approach to Section 924(c)(3)(B) tailored to its particular language and context, however, was effectively forestalled by reliance on this Court's developing categorical-approach jurisprudence. Although that jurisprudence arose in the context of prior convictions, it came to predominate the landscape of offense-classification provisions.

The watershed was this Court's 1990 decision in *Taylor* v. *United States*, *supra*. Relying in part on practical

considerations and Sixth Amendment concerns, the Court in *Taylor* held that to determine whether a defendant's prior conviction constitutes the enumerated crime of "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), courts generally must "look only to the fact of conviction and the statutory definition of the prior offense." 495 U.S. at 602; see *id.* at 601-602; pp. 40-44, *infra*. The ordinary-case categorical approach is a close relative of *Taylor*'s. See *Dimaya*, 138 S. Ct. at 1211 & n.1.

Noting that it was not the first court to do so, this Court in *James* v. *United States*, 550 U.S. 192 (2007), overruled by *Johnson* v. *United States*, *supra*, applied the ordinary-case categorical approach in the context of the ACCA's residual clause, which encompassed prior convictions for an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). See *James*, 550 U.S. at 208 (citing *United States* v. *Thomas*, 361 F.3d 653, 659 (D.C. Cir. 2004), vacated, 543 U.S. 111 (2005)). The Court explained that application of the ACCA's residual clause requires an analysis of "whether the conduct encompassed by the elements of the offense, in the ordinary case" posed such a risk. *Ibid.* The Court in *Leocal* had taken a similar approach, without much discussion, to the application of Section 16(b) to classify a prior conviction in the context of a civil immigration proceeding. See 543 U.S. at 7. And the plurality in *Dimaya* explicitly took the view that Section 16(b) incorporates *James*'s ordinary-case categorical approach. See 138 S. Ct. at 1217-1218. But at the time that *James* was decided, the application of the categorical approach was not understood to raise any serious constitutional concerns. See *Johnson*, 135 S. Ct. at 2556; *Sykes* v.

United States, 564 U.S. 1, 13 (2011), overruled by *Johnson* v. *United States*, *supra*; *James*, 550 U.S. at 210 n.6; p. 45, *infra*.

In the absence of specific guidance from this Court, or reason to think that the categorical approach presented constitutional concerns, the government and the lower courts generally treated Section 924(c)(3)(B) analogously to similarly worded provisions in the ACCA's residual clause and Section 16(b), despite the provisions' different contexts. Courts of appeals regularly cited *Taylor* when applying the categorical approach to Section 924(c), including when applying Section 924(c)(3)(B). See, *e.g.*, *United States* v. *Taylor*, 176 F.3d 331, 337-338 (6th Cir. 1999); *United States* v. *Kennedy*, 133 F.3d 53, 56 (D.C. Cir. 1998); *United States* v. *Moore*, 38 F.3d 977, 979-981 & n.6 (8th Cir. 1994); *United States* v. *Mendez*, 992 F.2d 1488, 1489-1490 (9th Cir.), cert. denied, 510 U.S. 896 (1993). Courts also continued to treat precedents under Section 924(c)(3) and Section 16 as interchangeable. See, *e.g.*, *United States* v. *Benally*, 843 F.3d 350, 354 (9th Cir. 2016); *United States* v. *Williams*, 343 F.3d 423, 431 (5th Cir.), cert. denied, 540 U.S. 1093 (2003); *Park* v. *INS*, 252 F.3d 1018, 1022 (9th Cir. 2001), overruled by *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121 (9th Cir. 2006); see also, *e.g.*, *United States* v. *Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995) (relying on Section 16(b)'s legislative history to reject defendant's proposal for a circumstance-specific approach to Section 924(c)(3)(B)), cert. denied, 516 U.S. 1164 (1996).

2. The adoption of the categorical approach in the prior-conviction context reflects practical and constitutional concerns that are irrelevant to Section 924(c)(3)(B)

The cross-pollination of circuit law had the unfortunate effect of losing sight of Congress's deliberate isolation of Section 924(c)(3). As several courts of appeals have recognized since *Dimaya*, because Section 924(c)(3)(B) is subsection-specific and never applies to the classification of prior convictions, much of the rationale underlying the categorical approach is absent. Indeed, the practical and constitutional concerns that favored a categorical approach to provisions that classify prior convictions support a circumstance-specific approach to Section 924(c)(3)(B).

a. This Court has made clear that the adoption of the categorical approach for classifying prior convictions rests in part on a practical concern—avoiding "the relitigation of past convictions in minitrials conducted long after the fact," *Moncrieffe* v. *Holder*, 569 U.S. 184, 200-201 (2013)—that does not exist in the Section 924(c)(3)(B) context. A circumstance-specific approach to prior convictions has the "daunting" practical obstacle of requiring a determination—potentially many years later—how a defendant's prior offense actually occurred. *Taylor*, 495 U.S. at 601; see *ibid.* (noting the related "potential unfairness" to defendants from a factual approach to past convictions); see also *Mathis* v. *United States*, 136 S. Ct. 2243, 2253 (2016) (similar); *Shepard*, 544 U.S. at 20 (describing the categorical approach as a "pragmatic" way to "avoid[] subsequent evidentiary enquiries").

Surmounting that obstacle would be a considerable challenge. Convictions underlying an ACCA enhancement are often "adjudicated by different courts in pro-

ceedings that occurred long before the defendant's present sentencing." *Douglas*, 907 F.3d at 14 (citation omitted); see *Taylor*, 495 U.S. at 578 & n.1 (addressing ACCA classification of two prior burglary convictions adjudicated in Missouri state courts 17 and 25 years earlier). The same is true for many statutes that incorporate Section 16(b) in the context of classifying prior convictions, including the INA provision at issue in *Leocal* and *Dimaya*. See *Dimaya*, 138 S. Ct. at 1218 (plurality opinion) (discussing the "utter impracticability" of a circumstance-specific approach to classifying prior convictions under Section 16(b)) (quoting *Johnson*, 135 S. Ct. at 2562). Although Congress has nonetheless sometimes required a circumstance-specific approach to prior convictions, see *Nijhawan*, 557 U.S. at 32; *Hayes*, 555 U.S. at 426, the categorical approach "serves a purpose when evaluating prior state convictions committed long ago in fifty state jurisdictions with divergent laws," *United States* v. *St. Hubert*, 883 F.3d 1319, 1336 (11th Cir.), cert. denied, 139 S. Ct. 246, vacated, 909 F.3d 335, 337 (11th Cir. 2018); see *Douglas*, 907 F.3d at 13.

The categorical approach would serve no such purpose in the context of Section 924(c)(3)(B). As discussed, the application of Section 924(c)(3)(B) does not depend on a historical conviction, but rather on "a crime of *pending* prosecution." *Barrett*, 903 F.3d at 169; see also, *e.g.*, *Shuti* v. *Lynch*, 828 F.3d 400, 449-450 (6th Cir. 2016), cert. denied, 138 S. Ct. 1977 (2018). A Section 924(c) prosecution necessarily involves a "developed factual record" about the underlying crime. *St. Hubert*, 883 F.3d at 1335. Because "the predicate offense and the § 924(c)(3)(B) enhancement are considered at the same time," *Douglas*, 907 F.3d at 13, the practical concerns that favored the adoption of a categorical approach in the context of prior

convictions do not arise in prosecutions under Section 924(c)(3)(B). In fact, in the context of Section 924(c)(3)(B), a circumstance-specific approach is more workable and fair than a categorical one.

This Court has characterized the "'ordinary case'" approach as "an excessively 'speculative,' essentially inscrutable thing" that "'offers significantly less predictability than one that deals with the actual facts.'" *Dimaya*, 138 S. Ct. at 1214-1215 (quoting *Johnson*, 135 S. Ct. at 2558, 2561) (ellipsis omitted). Cf. *Ovalles*, 905 F.3d at 1253 (W. Pryor, J., concurring) ("How did we ever reach the point where this Court, sitting en banc, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It's nuts."). Where "the facts concerning the relevant predicate crime * * * will [already] be in front of a jury," *Douglas*, 907 F.3d at 14, it is far more sensible for the jury to conduct a circumstance-specific inquiry based on the existing factual record than it would be for a judge "to 'imagine' an 'idealized ordinary case of the crime,'" *Dimaya*, 138 S. Ct. at 1214 (quoting *Johnson*, 135 S. Ct. at 2557-2558). As previously discussed, see pp. 20-25, *supra*, juries have long been called upon to make determinations of risk based on the facts of particular cases, with no apparent difficulty, and a jury hearing a Section 924(c) case could easily do the same. See, *e.g.*, *Johnson*, 135 S. Ct. at 2561; *United States* v. *Simms*, No. 15-4640, 2019 WL 311906, at *26-*27 (4th Cir. Jan. 24, 2019) (Wilkinson, J., dissenting).

b. In addition to practical considerations, "this Court adopted the categorical approach in part to 'avoid[] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact'" regarding

prior convictions "'that properly belong to juries.'" *Dimaya*, 138 S. Ct. at 1217 (plurality opinion) (quoting *Descamps* v. *United States*, 570 U.S. 254, 267 (2013)) (brackets in the original); see *id.* at 1253 (Thomas, J., dissenting) (describing Sixth Amendment concerns as the "heart of the decision" to adopt the categorical approach in *Taylor*) (citation omitted). Those Sixth Amendment concerns do not exist in the context of Section 924(c)(3)(B), where it is the jury itself that would make the requisite finding.

For example, a plurality of the Court in *Shepard* v. *United States*, *supra*, suggested that a judge's resolution of the disputed facts underlying a defendant's prior conviction at sentencing would be "too much like" the kind of factfinding that the Sixth Amendment requires the jury to conduct. 544 U.S. at 25; see *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) (holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). The plurality in *Shepard* thus indicated that, in the context of the ACCA's residual clause—which increases certain defendants' statutory sentencing range based on qualifying prior convictions—the categorical approach is supported by the "rule of reading statutes to avoid serious risks of unconstitutionality." 544 U.S. at 25. And in *Dimaya*, a plurality of this Court observed that the same Sixth Amendment concerns counseled against adopting a circumstance-specific approach to Section 16(b), which is incorporated not only into the INA, but also into certain criminal-sentencing provisions, for the purpose of classifying prior convictions. 138 S. Ct. at 1217.

Section 924(c)(3)(B), in contrast, never applies to the classification of prior convictions or to criminal sentencing. It instead provides a subsection-specific definition of "crime of violence" that applies only in the context of a criminal prosecution in which a defendant would enjoy the full protection of the Sixth Amendment's jury-trial right. As a result, "[t]he Sixth Amendment concern is avoided because the trial jury, in deciding whether a defendant is guilty of using a firearm 'during and in relation to any crime of violence,' 18 U.S.C. § 924(c)(1)(A), can decide whether the charged predicate offense is a crime of violence as defined in § 924(c)(3)(B)." *Barrett*, 903 F.3d at 182. In other words, the circumstance-specific approach would result in more jury findings, not fewer. *Douglas*, 907 F.3d at 15. Thus, far from potentially *denying* defendants their jury-trial right, submitting the Section 924(c)(3)(B) inquiry to the jury fully respects it.

C. The Constitutional-Avoidance Canon Requires That Section 924(c)(3)(B) Be Construed To Incorporate A Circumstance-Specific Approach

Stripped of the practical and constitutional concerns that animated this Court's adoption of the categorical approach in the context of prior convictions, this Court should, instead, adopt the circumstance-specific approach for Section 924(c)(3)(B), which, for the reasons explained, reflects the best contextual interpretation of Section 924(c)(3)(B). Indeed, were there any doubt on this score, the same constitutional-avoidance rule that favored the ordinary-case categorical approach in the context of classifying prior convictions militates *against* that approach here. As this Court has repeatedly explained, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is

'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted); see also, *e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018); *United States ex rel. Attorney Gen. of U.S.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909). It is now clear that construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach would render it unconstitutional. Thus, even if the circumstance-specific approach were not the best reading of the statutory text, but see pp. 20-32, *supra*, it should be adopted because it is, at a minimum, "'fairly possible.'" *St. Cyr*, 533 U.S. at 300.

1. Before 2015, neither courts nor the government had reason to suspect that applying an ordinary-case categorical approach to Section 924(c)(3)(B) created any constitutional doubt. After endorsing that approach under the ACCA's residual clause in *James*, 550 U.S. at 208, the Court proceeded to apply it in a series of additional cases involving the classification of prior convictions under that clause. See *Begay* v. *United States*, 553 U.S. 137, 141 (2008); *Chambers* v. *United States*, 555 U.S. 122, 125 (2009); *Sykes*, 564 U.S. at 3-4. In two of its decisions, including *James* itself, "the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws." *Johnson*, 135 S. Ct. at 2556; see *Sykes*, 564 U.S. at 13; *James*, 550 U.S. at 210 n.6.

The Court then granted certiorari in *Johnson* to apply the ordinary-case categorical approach under the ACCA's residual clause to yet another type of offense. See 135 S. Ct. at 2256. But it subsequently ordered supplemental briefing and reargument, and it then struck down the ACCA's residual clause on Fifth Amendment vagueness grounds. *Ibid.* The Court concluded that

"[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2257. The first was its incorporation of the ordinary-case categorical approach, which "leaves grave uncertainty about how to estimate the risk posed by a crime" by tying "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Ibid.* The second was "uncertainty about how much risk it takes for a crime to qualify" as categorically risky. *Id.* at 2558. "It is one thing," the Court explained, "to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Ibid.*

Soon after holding for the first time that the ordinary-case categorical approach has vagueness implications, the Court granted certiorari in *Dimaya* to address the constitutionality of the "crime of violence" definition in Section 16(b), as incorporated into an INA provision assigning immigration consequences to a particular type of prior conviction. 138 S. Ct. at 1210. The government did not dispute that Section 16(b), which is also incorporated into numerous provisions that require the classification of prior convictions in the criminal sentencing context—and thus, in those contexts, raises the same practical and constitutional considerations as the ACCA's residual clause—invites an ordinary-case categorical approach. See *id.* at 1217 (plurality opinion) ("Perhaps one reason for the Government's reluctance [to advocate a circumstance-specific approach] is that such an approach would generate its own constitutional questions."). And notwithstanding some textual differences between the ACCA's residual clause and Section 16(b), the Court held Section 16(b) to likewise be unconstitutionally vague because it "has the same two features as

ACCA's, combined in the same constitutionally problematic way." *Id.* at 1213 (majority opinion).

Although courts and the government previously construed Section 924(c)(3)(B) in line with Section 16(b), in light of *Johnson* and *Dimaya*, the canon of constitutional avoidance compels a construction of Section 924(c)(3)(B) that adopts the circumstance-specific approach. Such a construction avoids the vagueness concerns that led this Court to invalidate the ACCA's residual clause and Section 16(b), as incorporated into the INA. As the Court emphasized in both *Johnson* and *Dimaya*, applying a "substantial risk" standard "to real-world conduct" is constitutionally unproblematic. *Dimaya*, 138 S. Ct. at 1215 (quoting *Johnson*, 135 S. Ct. at 2561); see *id.* at 1241 (Roberts, C.J., dissenting); *id.* at 1257 (Thomas, J., dissenting). By contrast, an interpretation of Section 924(c)(3)(B) that steers straight into the teeth of *Johnson* and *Dimaya*—despite the availability of a textually sound alternative interpretation that raises no constitutional doubts—cannot be reconciled with the rule that "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012) (emphasis omitted).

The *Dimaya* plurality's reasons for declining to apply the canon of constitutional avoidance to adopt a circumstance-specific reading of Section 16(b) are inapposite here. Emphasizing the Sixth Amendment concerns that had motivated the categorical approach in the first place, the plurality reasoned that the constitutional-avoidance canon could not "serve * * * as the interpretive tie breaker" for Section 16(b) because it "would merely ping-pong [the Court] from one constitutional

issue to another." *Dimaya*, 138 S. Ct. at 1217. But to the extent that "avoid[ing] the Scylla of the Sixth Amendment['s]" jury-trial right for Section 16(b) necessitated "steer[ing] * * * straight into the Charybdis of the Fifth" Amendment's vagueness concerns, *id.* at 1254 (Thomas, J., dissenting), that is not the case with respect to Section 924(c)(3)(B), where the jury would have a *greater* role under a circumstance-specific approach. See pp. 42-44, *supra*.

And to the extent that the plurality's statement that Section 16(b)'s text is "[b]est read" to "demand[] a categorical approach" suggested its view that no circumstance-specific construction of Section 16(b) was plausible, *Dimaya*, 138 S. Ct. at 1217, Section 924(c)(3)(B)'s limitation to the jury-trial context provides ample support for reading its text differently. See pp. 20-32, *supra*; see also, *e.g.*, *Curtis Johnson* v. *United States*, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning."). Indeed, the *Dimaya* plurality's interpretation of Section 16(b) was informed by the "utter impracticability" of a circumstance-specific approach to Section 16(b)'s classification of prior convictions. 138 S. Ct. at 1218 (citation omitted). But such an approach is, if anything, the *more* practical one here.

2. The longstanding rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter," *Jones* v. *United States*, 526 U.S. 227, 239 (1999) (citation omitted), is therefore controlling here. Adhering to it would also further the underlying separation-of-powers rationale for the rule,

which arises "out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Id.* at 239-240 (citation omitted).

It is clear from the face of Section 924(c)(3)(B) that Congress intended to punish offenders who employ firearms in the course of committing violent crimes. As the courts' repeated difficulties applying the ACCA's residual clause made clear, see *Johnson*, 135 S. Ct. at 2558-2559, Congress has struggled to develop a form of words that captures that intent in a precise enough way *in the abstract*. But the language it enacted in Section 924(c)(3)(B) is sufficiently precise for circumstance-specific application by a jury. See *Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2561. Unnecessarily construing that language to refer to an abstraction—and thereby rendering it unconstitutional—would inappropriately undermine Congress's law-enforcement efforts, with severe practical consequences.

In the 12-month period ending June 30, 2018, more than 3000 defendants were charged with a Section 924(c) violation. U.S. Courts, *Table D-2—U.S. District Courts—Criminal Statistical Tables For The Federal Judiciary* (June 30, 2018), http://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2018/06/30 (Row 68). Invalidating Section 924(c)(3)(B) would impede the enforcement of federal criminal law by effectively immunizing from Section 924(c) prosecution many defendants who commit offenses that do not technically fit within Section 924(c)(3)(A), but that are plainly violent. As the facts of this case illustrate, defendants whose prosecution requires application of Section 924(c)(3)(B) include some of the most violent criminals on the federal docket.

Conspiracy to commit the sort of violent robbery spree at issue here—involving takeover-style armed robberies in which respondents threatened to injure or kill store employees with a loaded short-barreled shotgun—indisputably "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B); see pp. 3-6, *supra* (detailing respondents' crimes). A Hobbs Act conspiracy need not, however, lead to the commission of the planned robbery, see *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961), and thus such a conspiracy does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another," so as to qualify as a "crime of violence" under 18 U.S.C. 924(c)(3)(A).[5]

If Section 924(c)(3)(B) were invalidated, individuals who plan to—or, like respondents, actually do—use a gun in furtherance of a conspiracy that results in a substantial risk of force could escape prosecution under Section 924(c). See *Simms*, 2019 WL 311906, at *1 (vacating Section 924(c) conviction where underlying crime was conspiracy to commit Hobbs Act robbery in which defendant robbed a McDonald's restaurant, "struck the manager with [a] gun, [and] threw a cash drawer at [another] employee"); *United States* v. *Eshetu*,

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[5] The Fifth Circuit has determined that Hobbs Act conspiracy requires proof of at least one "overt act by one of the conspirators to further the conspiracy." *United States* v. *Stephens*, 964 F.2d 424, 427 (1992); see ROA 15-16 (indictment); ROA 1357 (jury instructions). Under general principles of conspiracy law, however, an overt act need not be violent or even "be itself a crime." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942); see 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b), at 372-377 (3d ed. 2018).

898 F.3d 36, 36-38 (D.C. Cir.) (per curiam) (vacating Section 924(c) conviction where underlying crime was conspiracy to commit Hobbs Act robbery in which the defendants planned to rob a liquor store using knives and guns), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018).

Other violent crimes might likewise be excluded. In *United States* v. *Salas*, 889 F.3d 681, petition for cert. pending, No. 18-428 (filed Oct. 3, 2018), for example, the Tenth Circuit held that Section 924(c)(3)(B) is unconstitutionally vague and that federal arson, 18 U.S.C. 844(i), does not qualify as a "crime of violence" under Section 924(c)(3)(A) because it could be committed by setting fire to one's own property, and thus does not have "as an element" the use of force "against the person or property *of another*." 18 U.S.C. 924(c)(3)(A) (emphasis added); see 889 F.3d at 683-684, 687-688. The court accordingly vacated the Section 924(c) conviction of a defendant who firebombed a business with a Molotov cocktail. *Salas*, 889 F.3d at 683, 688.

Similarly, in *United States* v. *Jenkins*, 849 F.3d 390 (2017), vacated, 138 S. Ct. 1980 (2018), the Seventh Circuit determined that Section 924(c)(3)(B) is unconstitutionally vague, *id.* at 394, and that federal kidnapping under 18 U.S.C. 1201(a) does not qualify as a crime of violence under Section 924(c)(3)(A) because holding a person "for ransom or reward or otherwise," 18 U.S.C. 1201(a), "can be accomplished without physical force" (*e.g.*, by tricking the victim), 849 F.3d at 393. It therefore vacated a Section 924(c) conviction where the underlying crime was a kidnapping in which the defendant held the victim at gunpoint, beat him, doused him in gasoline, placed a firework in his mouth, and threatened to

shoot him execution-style. *Id.* at 395; Gov't C.A. Br. at 5-7, *Jenkins*, *supra* (No. 14-2898).

Cases in which defendants are challenging Section 924(c) convictions involving equally violent underlying crimes are currently pending in other courts of appeals. See, *e.g.*, Gov't C.A. Br. at 3-4, 11, *Knight* v. *United States*, No. 17-6370 (6th Cir. Nov. 28, 2018) (assault and robbery of a postal employee, in violation of 18 U.S.C. 2114(a), involving the gunpoint robbery, abduction, and threatened murder of a postmaster); Gov't C.A. Br. at 3-5, 11-14, *Eizember* v. *United States*, No. 17-1406 (8th Cir. Oct. 29, 2018) (kidnapping, in violation of 18 U.S.C. 1201, during which the victims, who had stopped to help the defendant with his disabled car, were pistol whipped and threatened with death); Gov't C.A. Br. at 5-8, 46, *United States* v. *Cruz-Ramirez*, No. 11-10632 (9th Cir. Nov. 17, 2017) (racketeering conspiracies, in violation of 18 U.S.C. 1959(a) and 1962(d), involving multiple gang-related murders). This Court should not adopt an interpretation of Section 924(c)(3)(B) that requires its invalidation, and thus permits defendants who have planned to engage in, or actually committed, such violent acts to escape liability under Section 924(c).

In addition to limiting current and future prosecutions, striking down Section 924(c)(3)(B) would allow currently incarcerated violent criminals back on the streets. A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is unconstitutionally vague—would be a retroactive substantive rule applicable on collateral review. See *Welch* v. *United States*, 136 S. Ct. 1257, 1264 (2016). Defendants who committed violent crimes like those described above could thus be immediately released from prison, on the

theory that the criminality of their conduct under Section 924(c) was in fact constitutionally indeterminate. Under a circumstance-specific construction of Section 924(c)(3)(B), in contrast, the only prisoners who might be eligible for collateral relief would be those who could show actual innocence under the statute as so construed. See *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998). Both retrospectively and prospectively, an interpretation of Section 924(c)(3)(B) tailored to punish defendants whose conduct was or is *actually* violent is the most respectful of Congress's efforts.

II. RESPONDENTS' SECTION 924(c) CONVICTIONS ARE VALID BECAUSE A JURY NECESSARILY WOULD HAVE FOUND THAT THEIR CONDUCT INVOLVED A "SUBSTANTIAL RISK" OF PHYSICAL FORCE

Properly construed, Section 924(c)(3)(B) requires a jury to determine (or a defendant to admit through a plea) that his conduct "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). Although the district court in this case did not instruct the jury to make that determination, that error was harmless beyond a reasonable doubt. See *Neder* v. *United States*, 527 U.S. 1, 8-13 (1999) (holding that a jury instruction that omits an element of the offense may be harmless); *Barrett*, 903 F.3d at 184 (applying harmless-error analysis to uphold Section 924(c)(3)(B) conviction where jury had not been instructed on substantial-risk inquiry).

As the government argued in the court of appeals (Gov't C.A. Br. 27-29; Gov't Second Supp. C.A. Letter Br. 23-25), on the facts of this case, no reasonable doubt exists that a properly instructed jury would have found that respondents' conduct involved a substantial risk of

the use of physical force against the person or property of another. See Fed. R. Crim. P. 52(a). Respondents' conspiracy offense involved the planning and execution of a string of violent armed robberies during which they used a loaded short-barreled shotgun to threaten and immobilize their victims in an effort to force the victims to comply with their demands to hand over merchandise and money. Respondents did not deny their involvement in two of the violent robberies, see ROA 828-831 (Glover); ROA 840-841 (Davis), both of which effectuated and furthered their continuing conspiracy. In addition, in an effort to escape apprehension for the robberies they conspired to commit, respondents engaged police in a high-speed chase on a wet highway that culminated in a crash. Cf. *United States* v. *Reid*, 517 F.2d 953, 965 (2d Cir. 1975) (Friendly, J.) ("The escape phase of a crime is not * * * an event occurring 'after the robbery.' It is part of the robbery.") (citation omitted).

Accordingly, had the issue been submitted to the jury, it would have found that respondents engaged in conduct that posed a substantial risk of the use of physical force. As this Court recently explained, in the context of the ACCA's elements clause, the term "'physical force'" includes force that could "lead[] to relatively minor forms of injury," including "'hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling.'" *Stokeling*, 139 S. Ct. at 554 (interpreting 18 U.S.C. 924(e)(2)(B)(i)) (citation omitted). Respondents' conduct posed a substantial risk of force that far exceeded that threshold. Cf. *United States* v. *Parkes*, 497 F.3d 220, 232 (2d Cir. 2007) (noting that injury or death "is a natural consequence of a robbery which is premised on the use of overmastering force and violent armed confrontation"), cert. denied, 552 U.S. 1220 (2008). In light of respondents' actual

conduct during the course of their conspiracy, the jury would necessarily have found that the offense was a "crime of violence" under Section 924(c)(3)(B). Their convictions under Section 924(c)(3) should therefore be reinstated. At a minimum, the case should be remanded so that the government may retry respondents under proper jury instructions.

CONCLUSION

The judgment of the court of appeals should be reversed, or, alternatively, vacated and remanded with instructions to permit a retrial.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

3. 18 U.S.C. 922(g) provides in pertinent part:

Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924 (2012) provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with

any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prose-

cuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

5. 18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all

other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.